Common Pleas of New York.

JAMES McBRIDE *v.* JAMES A. DORMAN.

A party who gives up to his debtor his note or check past due and dishonored, for the note or check of a third person, is not in the same position as before the transaction, and is therefore a holder for value of the check received.

Where a person, in consideration of receiving from his debtor the note of a third person, gives up a note of his debtor which is past due, it is equivalent to an agreement on his part to cancel the existing indebtedness and to rely thereafter upon the obligation which he has taken in its stead.

It seems that the declarations of one who assigns his property for the benefit of his creditors, made prior to the assignment, are evidence against the assignee.

THIS action was brought by the assignee of the firm of Miles & Bartlett, to recover $2000 paid by his assignors to take up a note which they had made for the defendant's accommodation, and which the latter had neglected to pay.

The answer admitted the claim, but pleaded by way of set-off, that Miles & Bartlett were indebted to the defendant at the time of the assignment for $3400, had and received by them of him. The plaintiff's testimony was in substance as follows:—

Miles & Bartlett, Dorman, and the firm of A. L. Searing & Co., of which firm Mr. Tompkins was a member, were all in 1859 engaged in the business of buying and selling live and dressed hogs. Dorman had desk-room in Searing's office, and Tompkins was Dorman's clerk. He was in the habit of delivering to Tompkins checks signed by him in blank. One of these checks, for $3400, was made payable to Miles & Bartlett. Dorman learned of its issue the day after its date, found that it overdrew his bank account, immediately went about getting money to take it up, obtained the amount to within $200 or $300, paid it to Miles & Bartlett, gave them his check for the balance, and took up the check in question on or about December 22d 1859. Afterwards Dorman was informed by Miles or Bartlett that they had received this check from Tompkins for a check of A. L. Searing & Co., which had been dishonored.

Bartlett testified that he had no notice of any limitation on Tompkins's authority to fill up checks for Dorman.

It did not appear that Dorman ever notified the plaintiff or Miles & Bartlett that he was dissatisfied with Tompkins's course

in the matter. Searing & Co. were solvent at the time. $2150.38 of the $3400 paid by the defendant, was in a check of theirs.

The plaintiff asked the court to instruct the jury to find a verdict in his favor; the judge refused, and to his refusal there was an exception.

There was testimony for the plaintiff as to the consideration of the check in question, conflicting with that before stated.

The verdict was for the defendant. From the judgment entered thereon the plaintiff appealed to the General Term of the court.

Everett P. Wheeler, for plaintiff.—The defendant seeks to set off a claim for money paid under a mistake to Miles & Bartlett. To do this he must prove the mistake; that Miles & Bartlett had no legal right to collect the money; and in cases like the present, that he proceeded promptly to disaffirm the acts of his agent, and returned whatever that agent had received in the course of the transaction, from the parties with whom he dealt. The respondent failed to establish any one of these points.

1. He has not shown that the check for $3400 which he paid was not given in payment of a debt which he owed, or for some other valuable consideration. He testifies only to admissions of Miles or Bartlett "that they got that check from Tompkins for a check of A. L. Searing & Co. which had been dishonored."

The declarations or admissions of Miles & Bartlett were not evidence against their assignee, the plaintiff: *Foster* v. *Beals*, 21 N. Y. 247; *Paige* v. *Cagwin*, 7 Hill 361; *Smith* v. *Webb*, 1 Barb. S. C. R. 230; *Cuyler* v. *McCartney*, 33 Id. 165; *Jones* v. *Methodist Church*, 21 Id. 161, 174.

2. Miles & Bartlett were *bonâ fide* holders for value of the defendant's check.

a. The presumption is in their favor. They were holders of negotiable paper.

b. Their good faith is not impeached. Mere absence of care and caution in receiving negotiable paper is not enough to affect the holder's title. "We have shaken off the last vestige of a contrary doctrine:" *Steinhart* v. *Boker*, 34 Barb. 436; *Goodman* v. *Simmonds*, 2 How. U. S. Rep. 343, 363; *Raphael* v. *Bank of England*, 33 Eng. L. & Eq. 276; s. c. 17 C. B. 161; *Murray* v. *Lardner*, 2 Wallace 110.

c. Miles & Bartlett were holders for value of the defendant's check. There is no indication that the check of the latter was received as collateral only. On the contrary, the check, the proper and sole evidence of the debt, was delivered up. That the parties meant to extinguish the subsisting debt is thus rendered evident.

An exchange of negotiable paper makes the holders of the paper exchanged holders for value. It is immaterial whether the maker of the note received turns out to be insolvent: Byles on Bills 95; *Rice* v. *Mather*, 3 Wend. 62; *Hornblower* v. *Proud*, 2 B. & Ald. 327; *Whittier* v. *Eager*, 1 Allen 499; *Troy City Bank* v. *McSpedon*, 33 Barb. 81.

d. A person who receives negotiable paper in payment of a check which he at the time delivers up, is a holder for value of the paper received. If the defendant is allowed to repudiate his payment, the plaintiff is not put in possession of the check of Searing & Co. which he held beyond their control, and which was presumptive evidence in the hands of Miles & Bartlett of a debt due from the Searings: *Young* v. *Lee*, 12 N. Y. (2 Kern.) 552; *Stellheimer* v. *Meyer*, 33 Barb. 215; *Bank of Sandusky* v. *Scovell*, 24 Wend. 115; *Bank of Salina* v. *Babcock*, 21 Id. 499; *White* v. *Springfield Bank*, 3 Sandf. S. C. R. 522; *N. Y. Marble and Iron Works* v. *Smith*, 4 Duer 362; 1 Parsons on Bills 221, 222.

3. The rule that where, of two innocent parties, one must suffer by a fraud, the one who has enabled the guilty party to commit the fraud must bear the loss, is applicable to a case like this: 2 Term R. 70. The signing the check in blank was an authority to Tompkins to fill it up to any amount: *Schultz* v. *Astley*, 2 Bing. N. C. 544; *Violett* v. *Patten*, 5 Cranch 147. Tompkins in filling up Dorman's check claimed to act as his agent. The defendant was bound to act promptly if he intended to disaffirm his act. His neglect to do so, and especially his payment of the balance of the $3400 on the 30th of December, nine days after the transaction in question, amounted to an affirmance. Had he acted promptly, Miles & Bartlett might have secured themselves as against Tompkins and Searing & Co.: Story on Agency, §§ 256, 258; *Cairns* v. *Bleecker*, 12 Johns. 300.

4. A party who claims to repudiate a transaction on the ground of fraud, must return whatever has been received by him in the

transaction: Story on Agency, § 250; *Baker* v. *Robbins*, 2 Denio 136.

Clarkson N. Potter, for the respondent.—First. The case was properly submitted to the jury.

I. Defendant's statement, if believed, constituted a perfect defence; and Bartlett's declarations, to which defendant testified, were properly received in evidence.

Because the declaration of an insolvent assignor as to the validity of one of the assigned debts made before the assignment, is always evidence against the assignee: *Willis* v. *Farley*, 3 Car. & P. 395; approved, *Adams* v. *Davidson*, 10 N. Y. 313. And the cases to the contrary have since been overruled: *Schenck* v. *Warner*, 37 Barb. 261, 263. And it matters not that the assignor was still alive: *Beach* v. *Wise*, 1 Hill 613.

II. But even if Bartlett's declaration had not been excluded, the case should still have been left to the jury.

For it appeared by all the testimony that unless Dorman exchanged checks as alleged with Miles & Bartlett (the insolvent assignors of the plaintiff), he never received any value for his $3400 check, and was entitled to counterclaim for it. Plaintiff's witnesses insisted that there was such an exchange, and did not pretend that any other value was given for Dorman's check. Defendant positively denied this exchange; and declared that he left this and other checks of his with his book-keeper, signed in blank to be filled up by his book-keeper in payment for certain purchases of hogs, as the bills were presented for the same; and that the book-keeper had fraudulently filled up this check and issued it to Miles & Bartlett without authority or value to him, and as he learned from his book-keeper as well as from Bartlett, in exchange of an old debt of his book-keeper's.

III. No proof that Miles & Bartlett had notice of Tompkins's fraud when they took the check, was necessary.

No other value for the check, except the alleged exchange, was pretended. If Miles & Bartlett did not get it upon such an exchange, they never gave nor indicated that they gave any value for it. And Tompkins having issued the check without any authority, Miles & Bartlett could not hold it, even if they had no notice of such want of authority, since they took the check with-

out parting with value for it. And the Searing & Co. check given to Tompkins was not value—

a. Because it was dishonored at the time.

b. Because it was itself given for a debt past due which was not extinguished by the dishonored check, and which, unless extinguished by defendant's check, still subsists.

DALY, F. J.—It was shown on the part of the plaintiff that Miles & Bartlett's note for $2000 was made by them, for the defendant's accommodation; that he agreed to pay it, but they were obliged to pay it at maturity. Upon this state of facts the plaintiff was entitled to recover, unless the defendant established a counter-claim. The proof on the part of the defendant in respect to the counter-claim was substantially this. That he was in the habit of signing checks in blank to be filled up by Tompkins, who was his book-keeper, for hogs purchased upon the defendant's account; that Tompkins without authority filled up a blank check for $3400, and gave it to Miles & Bartlett for a check of A. L. Searing & Co., of which firm Tompkins was a member; that the defendant paid this check of $3400 to Miles & Bartlett without knowing from whom they obtained it, or for what it was given, and that he afterwards learned from Bartlett, that they got it from Tompkins for a check of A. L. Searing & Co., which had been dishonored; the defendant therefore claimed that as this check had been diverted by Tompkins to a different purpose from that which the defendant intended when he signed it in blank, as he paid the full amount of it to Miles & Bartlett, without knowledge of the circumstances, and, as they gave no value for it, but received it in exchange for a dishonoured check, that he was entitled to off-set the amount paid under such circumstances, against the amount paid by Miles & Bartlett, to take up the note which they had made for the defendant's accommodation.

At the time of the trial Miles was dead, but the surviving partner Bartlett was examined, and testified that the $3400 was taken up by the firm in exchange for a check of the same amount, which they made at the defendant's request, and which he gave to Tompkins; which check was produced at the trial, and had upon it a mark of the bank indicating that it had been paid. Bartlett denied that he ever told the defendant that his firm got the $3400 check for a dishonored check of A. L. Searing & Co., and

declared that he never had had a check of theirs, which had been dishonored, nor any trouble with them about their checks. This was directly contradicting the account which the defendant gave of this transaction, and was corroborated by the production of the check of Miles & Bartlett, dated the day after the date of the defendants' check, for the same amount $3400, with a mark indicating that it had been paid. But the conflict was wholly immaterial, for upon the defendant's own showing, Miles & Bartlett were holders of the $3400 for value; for if they surrendered and gave up for it the evidence of an indebtedness on the part of A. L. Searing & Co. to them, that was sufficient to constitute them holders for value.

Stellheimer v. *Meyer*, 33 Barb. 215; *Touney* v. *Lee*, 18 Id. 187, 12 N. Y. 551. It was held in the first if these cases that when a negotiable note is taken in good faith before it becomes due, in payment and satisfaction of a pre-existing indebtedness, and the evidence of such indebtedness is at the same time surrendered or destroyed, the person taking the note is a holder for a valuable consideration. In that case the evidence of indebtedness, which was given up, was a due-bill which was then past due and dishonored.

In *Cardwell* v. *Hicks*, 37 Barb. 465, the correctness of the decision was questioned by Mr. Justice LEONARD, who seems to have thought that it was decided upon the ground that the decision of the Court of Appeals in *Touney* v. *Lee*, *supra*, had overturned the cases of *Coddington* v. *Bay*, 20 Johns. 637, *Rosa* v. *Bartherson*, 10 Wend. 86, and *Stalker* v. *McDonald*, 6 Hill 93. *Touney* v. *Lee* has not overturned the authority of these cases, nor do I find anything in the opinion of Justice JOHNSON in *Stellheimer* v. *Meyer*, warranting the conclusion that that case was decided upon any such ground. It was not necessary to do so, for all that was ever decided in the three cases above referred to was that a party is not a holder for value, who receives the note of a third person for an existing debt under circumstances which show that he took it merely as security and not as a substitute for and in extinguishment of the original indebtedness. Chancellor KENT, whose opinion was affirmed in *Coddington* v. *Bay*, points to the fact that the notes in that suit were not taken in payment of an existing debt: 5 Johns. Ch. R. 57; and Chief Justice SPENCER, in his opinion in the Court of Errors, calls

attention to the circumstance that there was no proof that the parties who took the note had lost the benefit of any other security, and that as respects the original indebtedness their situation was exactly the same as if the notes had not been transferred to them. Chief Justice SAVAGE, in *Rosa* v. *Bartherson*, cited and illustrated the remark of Chief Justice SPENCER that all the cases cited in the argument of *Coddington* v. *Bay* were those where notes or bills were taken in the usual course of trade and for a present consideration paid, and *not where they were received as security for an antecedent debt.* Justice BEARDSLEY regarded the case as adjudging that one who receives negotiable paper in *payment* of a pre-existing debt, is not a holder for value. But as I understand the facts in the case, the note was merely received nominally in payment of a pre-existing debt, for the decision is put upon the ground that the plaintiff could lose nothing, as he gave nothing for the note, and had therefore no equity superior to that of the maker. If the case goes beyond this, which I think it does not, then, as Justice BEARDSLEY remarked, it has been overruled by later decisions in this state: *Scott* v. *Betts*, Lalor's Rep. 363.

In *Stalker* v. *McDonald*, *supra*, Senator LOTT, who gave one of the two opinions delivered, relies upon the circumstance that there was no stipulation or agreement on the part of Stalker, upon withdrawing the note of Gillespie & Edwards from the bank, that he would not enforce the payment of it, and it distinctly appeared upon the trial, and was so found by the jury, that Stalker merely received the note of the plaintiff from Gillespie & Edwards as collateral security for the payment of their note. The doctrine laid down by Chancellor WALLWORTH, who gave the other opinion, is that a *bonâ fide* holder of negotiable paper is one who has paid value for it or who has relinquished some *available security* or *valuable right* on the credit thereof, and not one who has received it for an antecedent debt, either as a *nominal payment* or as *security for payment*, without giving up any security for the debt which he previously had or giving any new consideration.

The point determined in *Stellheimer* v. *Meyer*, that one who receives the note of a third person in satisfaction of an existing debt, and gives up the evidence of the previous indebtedness, is a holder for value, did not and could not arise in *Stalker* v.

McDonald. The exact limit and nature of that decision is succinctly stated by Judge DUER in *White* v. *The Springfield Bank.* "The only question," he says, "that was discussed by the counsel, or which could properly arise upon the facts, was whether the court should adhere to the decision of *Coddington* v. *Bay*, or renounce its authority in deference to the judgment of the Supreme Court of the United States in *Swift* v. *Tyron*, 16 Peters 1. There was no question as to the effect of a transfer intended to operate and actually operating as a payment of a precedent debt. The notes in controversy had been transferred to the plaintiff in error, not for the purpose of then satisfying but as collateral security for the eventual payment of an existing debt, he retaining in his hands the evidence of the debt, and never for any point of time relinquishing the right or losing the power of enforcing its payment." "If," said Justice BEARDSLEY in *Scott* v. *Betts*, Lalor's Rep. 370, "the paper is received in payment and satisfaction of an existing debt, or if in consideration of its transfer some new responsibility is incurred or a valuable benefit relinquished by the person who receives it, he ought in my judgment on every principle to be deemed a purchaser for value. A debt which ought to be paid is cancelled by the creditor, a new burthen is assumed, and *some valuable advantage is given up.* Where in reason and justice can be the difference between a purchaser in one of these modes, or by a present payment of money?" The principle which pervades all the cases, from *Butler* v. *Harrison*, Cowp. Rep. 565, downward, is that where the party remains in respect to the original indebtedness, in exactly the same position as he was before, he shall not be deemed a holder for value; and adopting this as the test, and I think it is the true one, a party who gives up to his debtor his note or check past due, for the note or check of a third person, is not in the same position as he was before, as he has parted with a written acknowledgment of the indebtedness which is presumptive evidence of its existence. He gives up a benefit or advantage, for it may be that the instrument is the only means by which he could prove the fact of the original indebtedness. Justice ALLEN, in *Farrington* v. *The Frankfort Bank*, 24 Barb. 567, after an elaborate review of nearly all the authorities in this state, up to that time (1857), said in respect to the case before him: "The defendants are in as good a situation, if they are

compelled to surrender the bill indorsed by the plaintiff, as they would have been if they had never taken them—they parted with nothing;" plainly evincing in his mind that was the test. Where a party, in consideration of receiving from his debtor the note of a third person, gives up a note of his debtor which is past due, it must be regarded as equivalent to an agreement on his part to cancel the existing indebtedness, and to rely thereafter upon the obligation which he has taken in its stead. In *The Mohawk Bank* v. *Corey*, 1 Hill 513, the notes which were given up by the bank for the note of the defendant, were past due and had been sued upon, and Chief Justice BRONSON held that even if the note of the defendant had been diverted from its proper use, the bank had given a valuable consideration for it and were entitled to recover. In *Young* v. *Lee*, *supra*, and in *White* v. *The Springfield Bank*, *supra*, the paper given up was not yet due, but the case above quoted shows that that makes no difference, yet that it is the ground upon which Justice LEONARD relies as distinguishing the decision of the Court of Appeals in *Young* v. *Lee* from the case of *Stellheimer* v. *Meyer*. He has not, however, pointed out any reason why that should make a difference. Justice JOHNSON, in *Stellheimer* v. *Meyer*, was of the opinion that that could make no difference in principle, as was also Justice INGRAHAM, who delivered an opinion dissenting from that of Justice LEONARD in *Cardwell* v. *Hicks*, and in their view upon that point I fully concur. If the note given up is wholly worthless by the reason of the insolvency of the maker or otherwise, there would be some reason for holding that nothing of value had been parted with, but that is not the case here, for it was distinctly proved and not contradicted by the defendant that he paid the $3400 check to Miles & Bartlett, by a payment of $118 in cash and four checks, one of which was a check of this very firm of A. L. Searing & Co., showing that at that time their check was equivalent to cash and that they were responsible persons.

BRADY, J., concurred.

CARDOZO, J.—Upon the authority of *Brown* v. *Leavitt*, 31 N. Y. 113, I consider that I erred in refusing to charge that the plaintiff was a holder for value and absolutely entitled to recover, and therefore I concur that the judgment should be reversed and a new trial ordered.

The case of *Magee* v. *Badger*, 34 N. Y. 247, may be added to the authorities cited under the plaintiff's second point as to the presumption in favor of the holder of negotiable paper.

The court on the argument intimated an opinion that the plaintiff's first point was not well taken, and CARDOZO, J., on the second trial received in evidence the admissions of the plaintiff's assignors against his objection. It is submitted that *Cuyler* v. *McCartney*, 33 Barb. 165, *Jones* v. *Methodist Church*, 21 Id. 161, 174, are at variance with this ruling at Nisi Prius. In New York the assignee for the benefit of creditors can bring an action to set aside a fraudulent conveyance previously made by his assignor: Laws 1858, ch. 314. (Though this was probably otherwise before the statute: *Van Heusen* v. *Radcliff*, 17 N. Y. 580.) In *Pickett* v. *Leonard*, 34 N. Y. 75, it was held that a payment by an assignee under an insolvent assignment of part of a debt does not operate to take a case out of the Statute of Limitations. The assignee is primarily trustee for the creditors, and it is difficult to perceive any good reason for allowing the assignor to cut down their rights by his admissions.

The cases cited in the points show that the courts of New York have gone farther in excluding evidence of the admissions of assignors, in suits brought by the assignee, than the rule stated in 1 Greenl. Ev. § 190 would justify.

It was, however, held in *Adams* v. *Davidson*, 10 N. Y. 309, that admissions of the assignor of merchandise, made while in the actual possession of it, were evidence against the assignee. But this was put on the ground that they qualified and showed the character of his possession. They were part of the *res gestæ*.

It is not easy to reconcile *Foster* v. *Beals*, 21 N. Y. 247, with *Jermain* v. *Denniston*, 6 N. Y. (2 Seld.) 276. In the former a receipt in the handwriting of a mortgagee, dated before the mortgagor had notice of an assignment, was held inadmissible as against the assignee. In the latter, entries on the pass-book of a bank of payments on account of a note owned by it, were held admissible against its subsequent indorsee. The court put this on the ground that the entries were acts of the holder, and not mere admissions. It is true that in *Foster* v. *Beals* there was no evidence except the date, of the time when the receipt was given, and there were some suspicious circumstances attending the transaction. The court in *Jermain* v. *Denniston* did not hold that the date of the entry was *primâ facie* evidence of the time it was made, although RUGGLES, C. J., said that in the absence of suspicious circumstances it ought to be so considered. It is, we think, safe to say that under these decisions and those cited in the points, the rule in New York is that mere admissions of an assignor, even though made prior to the assignment, are not evidence against his assignee for value; but if the admission offered amounts to an act binding on him and on the party to whom it was made, and altering the relation between them, it is admissible in evidence against the assignee if shown by extrinsic evidence to have been made prior to the assignment. Whether its date, if it be in writing, is *primâ facie* evidence of this time, is, we think, still undecided. The admissions in the principal case were parol statements, not acted on, and not qualifying any actual possession. Unless the assignee is identical in interest with the assignor (see 1 Greenl. Ev. § 180), it would seem that they should have been excluded.

E. P. W.